Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

KEITH A. VA LERIE,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Addressing a question that has engendered disagreement and confusion among the lower courts, the decision below, for a deeply divided en banc court, held that when law enforcement agents act to obtain "dominion and control," *Jacobsen v. United States*, 466 U.S. 109, 120 (1984), over personal property an individual has temporarily entrusted to a common carrier or other bailee, they *do not* effect a "seizure" within the meaning of the Fourth Amendment, unless the government actions also delay his retrieving the property. The question presented is:

Whether the Eighth Circuit's rejection of the "dominion and control" standard and its three-part test for seizure are faithful to this Court's directly controlling precedent and to the Fourth Amendment?

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OPINIONS BELOW

The decision of the en banc Eighth Circuit, reported at 424 F.3d 694, is reprinted in the appendix at Pet.App.1a. The district court opinion is unreported and is reprinted at 35a, and the magistrate judge's report and recommendation is at 51a. The opinion of the Eighth Circuit panel, vacated on rehearing, was originally reported at 385 F.3d 1141 and is reprinted at 65a.

JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1). Jurisdiction was proper in the district court based upon 18 U.S.C. § 3231. Jurisdiction was proper in the appeals court based upon 18 U.S.C. § 3731. The United States Court of Appeals for the Eighth Circuit entered judgment on October 3, 2005. On December 27, 2005, Justice Thomas extended the time for filing the time for filing a petition for certiorari to and including February 16, 2006.

CONSTITUTIONAL PROVISION INVOLVED

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated * * * *

U.S. Const. amend. IV

STATEMENT

The decision of the en banc court in this case was rendered on a government appeal, see 18 U.S.C. § 3731, from a decision granting Petitioner Keith Va Lerie's motion to suppress physical evidence found during a search of a garment bag he had checked while traveling by Greyhound bus from Los Angeles, California to Washington, D.C.

When the bus stopped for refueling at the Greyhound terminal in Omaha, Nebraska, an agent of the Nebraska State Patrol ("NSP"), Alan Eberle, looked inside its lower luggage compartments. The agent later testified that he had noticed a "newer-looking garment bag" in one of the compartments, and had observed that the bag had a Greyhound baggage ticket

bearing an individual's name, but no telephone number and no handwritten name tag. A computer check on the luggage ticket indicated that the passenger, listed as "Valerie Keith," had paid cash, for a one-way ticket, on the day of travel – circumstances the agent testified he found suspicious.

Eberle instructed another officer to remove the bag from the bus and take it to a room in the rear baggage terminal – and he then had "Valerie Keith" and "Keith Valerie" paged over the public address system. When Petitioner responded, Eberle identified himself as a law enforcement officer, telling Mr. Va Lerie that he was not under arrest or "in trouble," but asking him to produce both his bus ticket and identification.

Upon confirming that the name on the ticket and identification matched the name on the garment bag, Eberle led Mr. Va Lerie to the private room where the garment bag was being held. At least two and as many as four police officers were in the room – and no Greyhound employee.

There was divergent testimony as to what occurred next – Eberle maintained that he had sought permission to open the bag and had received an (unspecified) "affirmative verbal response," which Mr. Va Lerie disputed – but a search of the bag uncovered five sealed bags containing drugs; Petitioner was placed under arrest and indicted on federal narcotics charges.

Mr. Va Lerie moved to suppress both the physical evidence and statements the police had elicited after he had invoked his right to speak with an attorney. The district court granted this motion in full. See Pet.App.35a-50a.

In partial disagreement with the magistrate judge – who had concluded that the agents' actions in removing the bag from the bus and taking it to the private room was a "seizure" but had recommended denying suppression on the ground that agents had possessed "reasonable articulable suspicion," Pet.App.57a – the district court held that the agents' actions:

> constituted an unconstitutional seizure in violation of [Mr. Va Leric's] Fourth Amendment rights because they

> occurred without consent, reasonable suspicion, probable cause, or a warrant.

Id. 45a. The court further concluded that the search of the bag was so intertwined with the initial seizure that even voluntary consent to the search would not have rendered the evidence admissible. In any event, the court found, the totality of the circumstances established that no consent to search the bag had been voluntarily given. *Id.* 45a-47a.[1]

The government's interlocutory appeal "expressly decline[d] to challenge the district court's * * * holding that Eberle lacked reasonable suspicion," Pet.App.74a n.5 (panel opinion). Rather, the government placed sole reliance on an argument it had not initially advanced in the district court: that "no constitutional 'reasonable suspicion'" was required – because "no constitutional seizure" had occurred. Accord *id.* 79a (Melloy, J., concurring) (noting that the parties initially had "seemed to assume that a seizure occurred" and that only later did the prosecution "abandon[] the reasonable suspicion argument").

The government further asked that the district court's factual finding concerning voluntariness be reversed as clearly erroneous – but it did not challenge the correctness of the

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[1] In making that finding, the district court recognized that the officers were not required to tell Petitioner that he could withhold consent and noted, *inter alia*, that Mr. Va Lerie was a person of sufficient maturity and intelligence to understand a consent request and that the agents had not acted in violently or threateningly, but decided that other circumstances weighed heavily against "voluntariness," stressing that Petitioner was "alone, in a private room, with at least two armed police officers," who already had "[h]is bag in the[ir] possession" when he was asserted to have authorized their search. Pet.App.47a.

The court also concluded – in a ruling the government did not challenge on appeal – that the agents' post-arrest interrogation of Mr. Valerie after he had expressly invoked his right to counsel was a serious enough violation of his *Miranda* rights that statements they had elicited could not be introduced at trial, even for impeachment purposes. See Pet.App.49a.